SQUIRE PATTON BOGGS

Adverse Possession: A New Test?

Last month, the UK Court of Appeal handed down its decision in *Shirley Ann Thorpe v. Harold Nobert Frank and Lesley Frank* [2019] EWCA Civ 150.

It has long been established that in order to acquire land by adverse possession, the claimant must prove uninterrupted "factual possession" of the land and an intention to possess the land to the exclusion of all others. It has been widely understood that in order to exclude all others from the land (including the owner with the paper title), the squatter must seek to enclose the disputed land to show their intent to possess.

The Court of Appeal has arguably varied the test for adverse possession by finding in this recent case that enclosure of the land is not an absolute requirement and it is not the only way to assert or achieve possession of the land.

Facts

Mr and Mrs Frank and Mrs Thorpe were the owners of No.8 and No.9 Harcourt Close, respectively, which were neighbouring semidetached bungalows. The land comprised in the title of No.8 was described as "jug-shaped", and the disputed land was a triangular plot forming the "jug spout", which lay parallel to the front of No.9.

Mrs Thorpe purchased No.9 in 1984. At the time of purchase, the previous owner, who had believed the land to be hers, had paved the disputed land with concrete paving slabs. Mrs Thorpe arranged for the area to be repaved in 1986, which was never questioned by the neighbour at No.8, and the land remained paved thereafter.

In 2013, Mrs Thorpe erected a fence that separated the disputed land from the rest of the title of No.8. This action triggered the dispute, which arose from Mrs Thorpe's claim to have acquired the disputed land by adverse possession.

In the first instance, the First-Tier Tribunal (FTT) found in favour of Mrs Thorpe. It held that Mrs Thorpe had achieved the necessary factual possession of the disputed land and had the necessary intention to possess from at least 1986.

In the Upper Tribunal (UT), the decision of the FTT was reversed on the grounds that the paving work in 1986 constituted a trespass that only lasted for the fortnight during its construction. Accordingly, the UT found that Mrs Thorpe was not in possession of the disputed land after the paving was completed.

Court of Appeal

Following an appeal by Mrs Thorpe, the claim was referred to the Court of Appeal, which reversed the UT's decision and held that Mrs Thorpe had established adverse possession of the disputed land.

The court reached this conclusion based on the nature of the land in question, which was "open land". Therefore, paving the disputed land with a permanent surface was a clear assertion of possession. The court emphasised, however, that each case must depend on the particular circumstances, but broadly, what must be shown in order to prove factual possession is that the alleged possessor had been dealing with the land in question as an occupying owner might have been expected to deal with it and that no one else has done so.

Lessons to Learn

This decision is the first of its kind in cases of adverse possession, as there appears to be no other case where paving alone has been found to be sufficient to meet the necessary requirements of adverse possession. This is, in essence, new law, as it indicates a clear departure from the precedent that enclosure of the land is required to show adverse possession.

In light of the decision, it is essential that landowners remain vigilant about the use of their land by third parties and be aware that the erection of a fence or physical barrier may not be the first sign of adverse possession (which was often the first alarm bell for landowners). This is of particular importance where a landowner has adjoining land of an "open nature". In these circumstances, it appears that an intention to permanently alter the surface of the land may be found as a clear assertion of possession.

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